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IN THE

Supreme Court of the United States

October Term, 1942

No. 273

ENOCH L. JOHNSON,
Petitioner

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER

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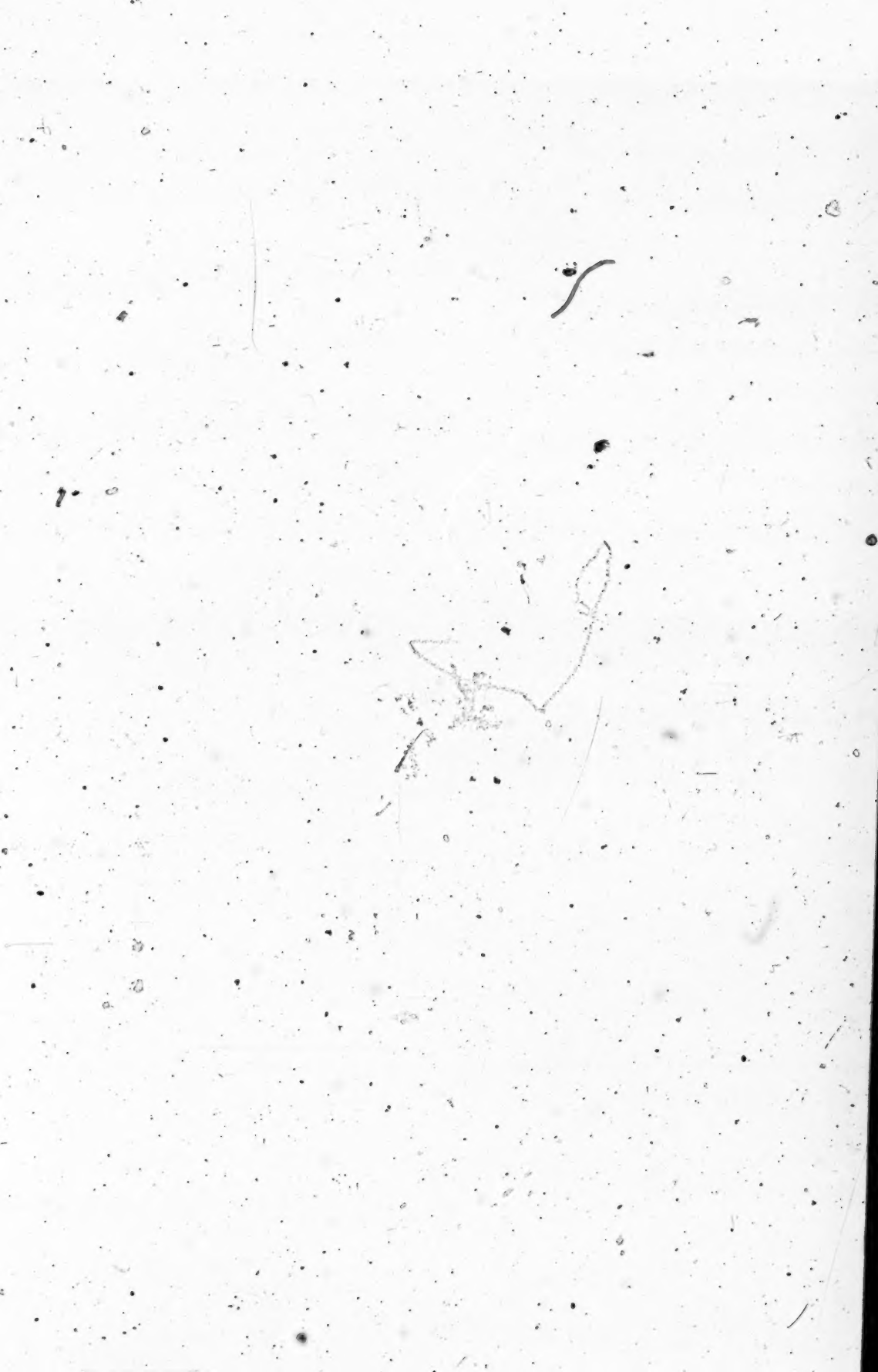

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I.

OPINIONS BELOW

The opinions for the Circuit Court of Appeals for the Third Circuit are reported in 129 F. 2d 954 (R. 217-241). The oral opinion of the trial court will be found in the record (R. 200).

II.

BASIS OF JURISDICTION

The jurisdiction of this Court is invoked (1) under the Fifth Amendment of the Constitution of the United States which grants defendants in criminal cases the privilege against self-incrimination and forbids the deprivation of life, liberty, or property without due process of law; (2) under the Sixth Amendment of the Constitution of the United States which guarantees to a person charged with crime a speedy and public trial and the right to have the assistance of counsel; and (3) under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938.

III.

STATEMENT OF THE CASE

This Court granted certiorari on October 12, 1942 to review the judgment of the Circuit Court of Appeals for the Third Circuit affirming petitioner's conviction and sentence entered in the United States District Court for the District of New Jersey.

The petitioner was found not guilty on Count I of an indictment which charged him with wilfully and feloniously attempting to evade and defeat his income tax for the year 1935, but was found guilty on Counts II and III charging him with similar offenses for the years 1936 and 1937 in violation of the Revenue Act of 1936, c. 690, Section 145 (b), 49 Stat. 1648.

Petitioner was sentenced to five years imprisonment and to pay a fine of $10,000 on each count, the terms of imprisonment to be consecutive.

The Government sought to prove that the petitioner had received money from those operating the "numbers business" in Atlantic City and that he had failed to include all of it in his income tax returns. During the course of the trial, the petitioner admitted receiving money from the so-called numbers business for the years 1935, 1936 and for the first ten months of the year 1937, which is all the Government proved. On cross examination, petitioner testified to his custom of sending slips of paper to his secretary containing notations of money received from the numbers game which represented the net amount remaining after certain deductions had been made, and which was reported in his returns as "Commissions" or "Other Commissions". He

was asked by the prosecutor whether he had followed this custom in 1938, to which objection was made and exception allowed (R. 126). Then petitioner was asked whether he had received numbers money in 1938, to which objection was made on the grounds that it was irrelevant and tended to prove another crime. The objection was overruled and an exception was allowed (R. 130-131).

After petitioner answered in the affirmative, he was then asked who had given the money to him. His counsel reiterated his objection to this line of questioning and suggested that the point be argued in the absence of the jury. The court agreed and after the jury was withdrawn, the following motion was made by the prosecutor (R. 132):

> "Mr. Burns: If the court please, as long as the jury has left the room and is not present I am going to ask that the defendant also be excused from the court room during the argument, and that when he resumes the stand he should do so without having an opportunity to hear what the argument is about and I suggest that he remain in the outer office of the chambers of Judge Avis during the argument.
>
> The Court: I think that is a fair request. You may retire, Mr. Johnson.
>
> (The defendant withdrew.)"

There followed an argument in the course of which petitioner's counsel contended that the evidence was irrelevant because it related to a separate and disconnected crime, and that it called upon the petitioner to incriminate himself (R. 132-139). The court ruled that the evidence was admissible on the question of credibility alone, and that petitioner could be advised of his constitutional right against self-incrimination without, however, being apprised by his counsel of the nature and outcome of the argument. An exception was granted (R. 139). He was not permitted

to confer with his counsel about the advisability and effect of claiming privilege.

Petitioner and the jury were then recalled to the court room and he was required to resume the witness stand immediately. He was asked again from whom he had received numbers money during 1938 (R. 139). At this point, with the permission of the court, his counsel stated to petitioner that he had a constitutional right not to answer questions which might tend to incriminate him. He thereupon claimed his privilege (R. 140). He also claimed privilege when asked what money he had used for political purposes during 1938 (R. 141). He was then asked to identify his income tax return for 1938, which he did after an objection was overruled and an exception granted (R. 142). He was asked over objection and exception whether the return for 1938 did not contain an item "Other Commissions" and answered "Yes". He thereupon was asked what money this item represented, but claimed his privilege R. 142-43).

Despite the fact that petitioner had been permitted by the court to invoke his constitutional privilege, the prosecutor in his speech to the jury, commented thereon, as follows (R. 167):

> "Now, ladies and gentlemen, can you believe that man [the petitioner] told you the truth about anything on the witness stand when he admits that he got numbers money in 1938 but won't tell you who he got it from on the ground that it would incriminate him? If you can believe that that man is innocent of this charge when he stands right up in front of you and says he cannot answer a question about 1938, that he just got through answering for 1937 on the ground that it would incriminate him, well, then, I just don't get it."

Objection was made to this statement and the court in its charge instructed the jury as follows (R. 173-74):

"Mr. Burns also referred to the fact that Mr. Johnson in cross examination when asked with regard to whom he received numbers money from in 1938, claimed his constitutional privilege of not being required to answer a question which he felt might tend to incriminate him. *Now, that may only be considered by you in testing his credibility as to the answers which he did give and his good faith in the matter.* We are not trying Mr. Johnson for anything that he did in 1938, that is not before you, that is an entirely different matter with which you or I have not any concern whatever. We are only considering in this case the years 1935, 1936 and 1937. In so far as any suggestion was made by Mr. Burns that that might be considered for any other purpose, you should disregard it."

IV.
QUESTIONS PRESENTED

1. While a criminal trial is being conducted, is it not a violation of the due process clause of the Fifth Amendment and the guarantee of a speedy and public trial under the Sixth Amendment to expel the defendant from the court room during an argument between opposing counsel concerning the relevancy and constitutionality of a proposed line of cross examination of the defendant, even though the jury is not then present?

2. If a defendant, in obedience to a court order withdraws from the court room during an argument upon the propriety of a series of questions which are being put to him as a witness, and his counsel does not object, can the defendant be held to have acquiesced in the court's direction so as to have waived his constitutional rights?

3. Is it not a violation of the Fifth and Sixth Amendments to prevent a defendant, by direction of the court upon the request of the United States Attorney, from conferring with his counsel and being advised as to the subject matter of an argument that took place during his enforced absence and as to the necessity and advisability of claiming his constitutional privilege against self-incrimination?

4. Is it not error for the United States District Court for the District of New Jersey to permit cross examination of a defendant concerning a collateral crime of which he has not been convicted, for the purpose of affecting his credibility, when such examination is contrary to the settled rule of that district and of federal courts generally?

5. When a defendant in a criminal trial is permitted by the court to claim his privilege against self-incrimination as to certain questions relating to a collateral crime, is it not a violation of the Fifth Amendment for the court to confirm the argument of the government attorney to the jury by charging that such refusals to answer may be considered in testing the defendant's credibility and good faith?

V.

ARGUMENT

(1) The Expulsion of Petitioner from the Court Room

This case presents the extraordinary situation of a defendant in a criminal prosecution being compelled by the trial judge, at the request of the Government attorney (the jury having withdrawn), to leave the court room during the course of his trial and being compelled further to resume the stand "without having an opportunity to hear what the argument [was] about".[1]

The research of two courts and counsel has failed to unearth a single case in which such a procedure was even attempted, let alone sanctioned, and we think that this, in itself, is highly indicative of the unique impropriety that was here committed.

The Circuit Court in the majority opinion conceded that this is an "extremely difficult question" on which it found no federal authority precisely in point, although it relied on *Snyder v. Massachusetts*, 291 U. S. 97 (1934), a case in which this Court divided five to four on a situation which, as we shall hereafter explain, was sui generis. The Circuit Court then adopted the following rule (R. 226):

> "We lay down the rule for this circuit that a defendant must be present in the court room at every stage of the proceeding which requires the presence of

[1] This was the suggestion of the prosecutor and the trial judge thought it "a fair request". (R. 432)

the jury. This is an absolute right. He should also be present at every other stage of the trial, from the time the first venireman is called to the box until judgment is rendered by the court upon the verdict of the jury. If he is not present when the triers of the facts are not present, but argument is being had before the court during the course of his trial, he must be deemed to be entitled to a new trial if it be found that any of his rights have been endamaged by his absence."[2]

In applying this test the Court concluded that the petitioner suffered no prejudice since the question being argued was purely one of law[3] and, since upon his return he was informed of his constitutional privilege and claimed it immediately.

The rule as thus laid down is framed in terms of "presence" and, we submit, does not put proper emphasis on the question actually before the court for decision, namely, under what circumstances is it proper to *expel* a defendant from the court room during his trial for the express purpose of preventing him from seeing and hearing what is about to transpire.

Even the rule as enunciated and applied, however, is irreconcilable with the complete uniformity of expression in federal decisions that due process of law in a criminal case requires the presence of the accused at *every* stage in his trial from the time the jury is empaneled until it renders its verdict.

Thus, this Court, speaking through Justice Harlan, in *Schwab v. Berggren*, 143 U. S. 442, 448 (1892) said:

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[2] 129 F. 2d 954, 960 (1942).

[3] The argument was actually one of mixed law and fact in which a number of assertions were made by the prosecutor about which petitioner was entitled to be advised and to consult with his attorney (R. 132-39).

"The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with."

And, in *Lewis vs. United States*, 146 U. S. 370, 372 (1892), in an opinion by Justice Shiras, it was said:

"A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner."

Again, in *Diaz vs. United States*, 223 U. S. 442, 455 (1912), Justice Van Devanter reiterated the principle that:

"In cases of felony, our Courts, with substantial accord, have regarded it [the right to be present] as extending to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself."

Similar recognition of the general rule may also be found in *Hopt v. Utah*, 110 U. S. 574 (1884), and *Dowdell v. United States*, 221 U. S. 325, 331 (1911). More recently two opinions by Chief Justice Taft have expressed the same view: *Ponzi v. Fessenden*, 258 U. S. 254, 260 (1922); *Shields v. United States*, 273 U. S. 583, 588, 589 (1927).

Those lower federal courts which have had occasion to pass on the question are in accord with the expressions above quoted: see, for example, *Fina v. United States*, 46 F. 2d 643, 644 (C. C. A. 10, 1931); *Ah Fook Chang v. United States*, 91 F. 2d 805, 809 (C. C. A. 9, 1937).

In the former case the court said:

"We have no doubt but that it is the constitutional right of one accused of a felony, as in this case, to be

present at every stage of the trial, because the trial by jury mentioned in our Constitution means a trial by jury according to the rules of the common law. The government * * * contends the burden is on defendant to show prejudice. We cannot agree with this contention at all. * * * This being a criminal case on a charge of felony, if error is shown to have been committed, prejudice will be presumed, unless the contrary is clearly made to appear. Again, the error here complained of is a denial to defendant of his constitutional right, and the denial to defendant on trial of his rights guaranteed to him by the Constitution is at all times deemed to be prejudicial."

Unquestionably, the great weight of authority in the state courts is in complete agreement with this view.[4] Thus, in *Commonwealth v. House*, 6 Pa. Superior Ct. 92, 111 (1897), quoted with approval in *Commonwealth v. Cohen*, 133 Pa. Superior Ct. 437, 442, 2 A. 2d 560, 562, (1938), it was said:

"No Pennsylvania case has held, or, as we firmly believe ever will hold, that a defendant, whether indicted for a felony or a misdemeanor, can be tried in his absence, unless he has expressly or impliedly waived the right to be present."

And in *Pierce v. State*, 47 Ga. App. 830, 831, 171 S. E. 731, 732 (1933), a case in which the defendant was absent for *only two minutes* while the State attorney was arguing to the jury, the court said in granting a new trial:

"We think that the right to be present at all stages of the trial ranks among the defendant's most sub-

[4] See the dissenting opinion of Mr. Justice Roberts in *Snyder v. Massachusetts*, 291 U. S. 97, 130-132 (1934), especially the cases cited in footnote 23.

stantial rights. It ranks next in importance to, if not on a par with, his right to be presumed to be innocent until proven guilty. * * * 'The presence of the counsel was no substitute for that of the men on trial. Both should have been present.'"

The general rule is summarized in *Cooley on Constitutional Limitations* (8th Ed. 1927), p. 667:

> "In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial and until the final judgment."

Despite the adherence which has been given to this time-honored principle, the Circuit Court, as we have said, relied solely on its interpretation of *Snyder v. Massachusetts*, 291 U. S. 97 (1934).[3]

The question directly presented for decision in that case was whether the Fourteenth Amendment required the defendant in a criminal case to be present when the jury, at the opening of the trial, viewed the scene of the crime, accompanied by the judge and opposing counsel, the view being permitted by a Massachusetts statute. In affirming the conviction, this Court held that the statute did not violate the Fourteenth Amendment since "the Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (p. 105)

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[3] The *Snyder* case, although deciding what constitutes due process under the Fourteenth Amendment, was held by the Circuit Court to be applicable equally to the due process clause of the Fifth Amendment.

The Court then decided that "a view is not a 'trial' nor any part of a trial in the sense in which a trial was understood at common law". (p. 113) This historical concept of a view, existing as it has "for about two centuries, if not longer", could not possibly offend the "traditions and conscience of our people". (p. 111)

Holding as it does, then, that a view is not part of the trial and hence that a defendant does not have to be present, the *Snyder* case cannot be said to be in conflict with the position now urged upon the Court. Indeed, a close reading of Justice Cardozo's opinion will show that he reserved decision upon this type of situation (p. 117):

> "This Court has not yet held that even upon a trial in court the absence of a defendant for a few moments while formal documents are marked in evidence will vitiate a judgment. * * * But we do not need to dwell upon the measure of the privilege at such a time or in such conditions. Whatever it may be, not even an intimation will be found in our decisions that there is a denial of due process if the accused be excluded from a view, though present at every stage of the proceedings in the court."

Justice Cardozo further recognized that "defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself." (p. 106)

In the light of this, it would be an anomaly to insist upon the presence of the defendant at a closing argument when his case already may have been lost and to exclude him from some earlier part of the trial when a crucial decision was being made and when his presence and assistance

would have been vital. It is no answer to say that petitioner's counsel was present and represented him since petitioner could have advised, made suggestions or even superseded his lawyer; nor is it enough to dismiss petitioner's contention by saying, even if it were so, that only an argument on the law was being had.[6] It is submitted that a defendant has a constitutional right to be present at every stage in his trial, especially where the very strategy of his defense is at stake.

In the words of the dissenting Judge in the Circuit Court (R. 241):

> "Any discriminations or refinements as to what does or does not constitute the trial, once the jury is empaneled, the verdict unreturned and the court in session and actually engaged in a disposition of the matter, are likely only to render that right something less than absolute."[7]

The rule accepted by the Circuit Court turns largely upon the presence or absence of the jury. It held that a defendant must always be present when the triers of the fact are present but his absence when they are not must cause him substantial prejudice in order to constitute reversible error. It should be noted that nowhere in any authority is a defendant's right made to depend upon the presence or absence of the jury,[8] and it is not difficult to

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[6] "* * * arguments to the court touching matters of law, as well as fact, should be in the hearing of the accused and his counsel": *Parks v. State*, 102 Tex. Cr. 24, 25, 26, 276 S. W. 1106, 1107 (1925). See in accord *Adams v. State of Florida*, 28 Fla. 511, 556, 10 So. 106, 117 (1891), quoted *infra*, p. 16.

[7] 129 F. 2d 954, 967 (1942).

[8] On the contrary, in *Brooks v. State*, 77 Tex. Cr. 517, 179 S. W. 447 (1915), it was held to be reversible error for the defendant's own attorney to make an argument to the court in the defend-

conceive of a situation in which a trial may be won or lost and a defendant be ultimately freed or imprisoned as the result of action taken in the absence of the jury. We submit, indeed, that such is the present case, and even if this Court sees fit to adopt the rule of "substantial prejudice" it should hold that petitioner's cause was fatally harmed by what happened at and resulted from the particular juncture of the trial from which he was expelled. His ignorance of what had occurred, his inability to consult with counsel about statements made by the prosecutor, his being deprived of advice, at the court's direction, as to the full effect, necessity and advisability of claiming privilege, and the subsequent erroneous charge of the court following the argument made by the government attorney to the jury ignored his constitutional rights and aided materially in bringing about his conviction.

We submit, however, that it is an entirely erroneous approach and one incompatible with the trend of decisions in this Court, to make the protection of the defendant's right depend upon the amount of prejudice he suffers through its denial. As Mr. Justice Roberts said in his dissenting opinion in the *Snyder* case (p. 136):

> "Nor ought this court to convert the inquiry from one as to the denial of the right into one as to the prejudice suffered by the denial. To pivot affirmance on the question of the amount of harm done the accused is to beg the constitutional question involved. The very substance of the defendant's right is to be present. By hypothesis it is unfair to exclude him. As this court has recently said with respect to disregard of

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ant's absence, even though the jury was also at that time not present in the court room. See similarly *Adams v. State of Florida*, 28 Fla. 511, 10 So. 106 (1891), discussed *infra*, p. 16.

the mandate of the Sixth Amendment respecting trial by jury:

> 'But the constitutional question cannot thus be settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar but more serious infractions which might be conceived. * * * It is not our province to measure the extent to which the Constitution has been contravened and ignore the violation, if in our opinion, it is not, relatively, as bad as it might have been.' "*

See also *Tumey v. Ohio*, 273 U. S. 510, 535 (1926); *Glasser v. United States*, 315 U. S. 60 (1942); and compare *McCandless v. United States*, 298 U. S. 342, 347 (1936).

The only state decisions which the Circuit Court found closely parallel to the present situation, but which were dismissed as "going too far", are *Adams v. State of Florida*, 28 Fla. 511, 555, 556, 10 So. 106, 117 (1891), and *Tiller v. State*, 96 Ga. 430-432, 23 S. E. 825, 826 (1895). Both support the view taken by petitioner which we urge this court to adopt.

In the *Adams* case the defendant was inadvertently excluded from the court room during the course of an argument at which time the jury was also absent, and yet the court there said:

> "It was early decided in this state, and has been rigidly adhered to in later decision, that the prisoner has the right, and in fact must be present during the trial of a capital [10] case, and no steps can be taken by

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* Quoting from *Patton v. United States*, 281 U. S. 276, 292 (1930).

[10] No distinction should be made in securing the requirements of due process between a capital case and any other felony or serious misdemeanor in which the defendant's liberty may be at stake. The Circuit Court recognized no such distinction in refusing

the court in his absence. Holton v. State, 2 Fla. 476, 500; Gladden v. State, 12 Fla. 562; Irvin v. State, 19 Fla. 872. There is no doubt about the fact that the accused here was taken from the court room and remained out for at least ten minutes during the discussion of the competency of a witness against him. He has the right to be present and hear questions of law as well as questions of fact discussed, and in fact no steps can be taken in the case in his absence."

The prosecutor in the *Tiller* case made his argument to the jury while the defendant was, unknown to the Judge, still confined in the jail to which he had been taken during a court recess. This was held to be such error as to require a new trial, the court saying:

> "It cannot be doubted that the argument of counsel is a stage of the proceedings for the trial is not concluded until after the verdict has been received and recorded. The importance of this particular stage as affecting the accused is obvious, it being a matter of vital concern to him to see and hear everything done and said both for and against him as the trial progresses."

We submit most earnestly that this court should unequivocally establish the rule for federal courts that the accused in a criminal case has the right to be present at every stage in his trial from the moment the first veniremen is called until the rendition of the verdict. But, in any event, we submit that due process of law requires the condemnation of a rule that permits the expulsion from the

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to follow either the *Adams* case or the *Tiller* case, nor has this Court in any of the cases to which we have referred. See Notes in 31 Michigan Law Review 245, 252 (1932); 17 Minnesota Law Review 415, 418 (1933); *Commonwealth v. O'Keefe*, 298 Pa. 169, 148 A. 73 (1929); *Garman v. State*, 66 Miss. 196, 5 So. 385 (1889).

court room of a defendant already present during the course of his trial.

> "The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof":
>
> *Snyder v. Massachusetts*, 291 U. S. 97, 122 (1934).

(2) Waiver of Petitioner's Rights

The majority of the Circuit Court sought to bolster its position that petitioner suffered no harm by his exclusion from the court room by holding further that he had acquiesced in the trial judge's order, since no specific objection was made. This conclusion is fully answered by the dissenting judge when he says (R. 241):

> "It is imputing responsibility rather summarily to say that a defendant's unquestioning compliance with a court's order at trial implies his acquiescence in the propriety of the order. Any waiver implied from the defendant's submission under the circumstances should not be invoked to dissipate a constitutional right. Cf. Hopt v. Utah, 110 U. S. 574, 579."[11]

As this court has recently had occasion to point out, "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights": *Glasser v.*

[11] 129 F. 2d 954, 967 (1942).

United States, 315 U. S. 60, 70 (1942). When one compares the facts of the present case in which the petitioner, who is a layman, merely obeyed a court order without objection, with the facts in the *Glasser* case in which no waiver was found although the defendant was an attorney with considerable experience in criminal procedure, it is difficult to see how any acquiescence or waiver can be imputed to the petitioner. Especially is this so since petitioner, unlike Glasser, did assign the action of the trial judge as error and did make it a ground of appeal.

In the *Glasser* case, this court further emphasized the duty that rests upon a trial judge to see "that the trial is conducted with solicitude for the essential rights of the accused". (p. 71) It was said, quoting Justice Sutherland,[12] that this duty must be discharged "with an eye to avoid unreasonable or undue departures" from the accepted mode of jury trial.

Despite the protecting duty thus incumbent upon the trial judge, he nevertheless unhesitatingly granted the prosecutor's extraordinary motion, saying merely that it was a "fair request".

This Court has so frequently refused to presume acquiescence in the loss of fundamental rights that we think it sufficient to refer to a number of those cases to show that the majority of the Circuit Court ruled improperly:

Hodges v. Easton, 106 U. S. 408, 412 (1882);
Lewis v. United States, 146 U. S. 370, 372 (1892);
Diaz v. United States, 223 U. S. 442, 455 (1912);
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 307 (1937);
Aetna Insurance Co. v. Kennedy, 301 U. S. 389, 393 (1937);
Johnson v. Zerbst, 304 U. S. 458, 464 (1938).

[12] *Patton v. United States*, 281 U. S. 276, 312 (1930).

Argument

(3) Denial of Advice of Counsel

It has already been related that when the petitioner was expelled from the court room upon the motion of the prosecutor, it was also directed that upon his return he should not be informed of the nature and outcome of the argument that had taken place. Accordingly it was only after he had returned, had resumed the witness stand without an opportunity to confer and was being cross examined again that his attorney was permitted to tell petitioner from the bar of the court of the existence of his constitutional protection against self-incrimination; even then they could not confer over the effect and advisability of claiming it. Having it put to him in this way, petitioner naturally claimed the privilege.

It is respectfully submitted that this was in direct contravention of the requirements of the Sixth Amendment guaranteeing to one charged with crime the assistance of counsel.

This right, of course, is "not formal, but substantial": *Johnson v. United States*, 110 F. 2d 562, 563 (D. C. C. A. 1940). In order to have any meaning whatever, the assistance of counsel must mean "effective assistance": *Thomas v. District of Columbia*, 90 F. 2d 424, 428 (D. C. A., 1937); *McDonald v. Hudspeth*, 41 F. Supp. 182 (D. C. Kan. 1941). Thus, the term must comprehend that the accused shall have the right not only to be represented by counsel at the trial, but also the right to confer with him "at all times": *Louie Yung v. Coleman*, 5 F. Supp. 702, 703 (D. C. Idaho, 1934).

As has been said frequently by this Court, the right of an accused to be heard "would be, in many cases, of little avail if it did not comprehend the right to be heard

by counsel": *Powell v. Alabama*, 287 U. S. 45, 68 (1932); *Johnson v. Zerbst*, 304 U. S. 458, 463 (1938). Further, the right to be heard by counsel includes the right of defendant "to give advice or suggestion, or even to supersede his lawyers altogether and conduct the trial himself": *Snyder v. Massachusetts*, 291 U. S. 97, 106 (1934). This being so, the right to counsel would similarly be of little avail if it did not mean that a defendant had the right to consult and advise with his attorney at *every* stage in the proceeding. And this Court has so held: *Powell v. Alabama*, supra, at p. 69; *Johnson v. Zerbst*, supra, at p. 463. "If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired": *Glasser v. United States*, 315 U. S. 60, 70 (1942).

It necessarily follows from our contention that petitioner had a constitutional right to be present and consult with his counsel at every stage in the trial, that he had the right to confer fully with him about the argument that had taken place since "the Sixth Amendment makes the right to counsel in criminal cases inviolable by the Federal Government": *Betts v. Brady*, 316 U. S. 455, 474 (1942).[13] This becomes even more important when it is realized that what had transpired constituted a crucial point in the trial.

It should be added that the Court in *Powell v. Alabama*, supra, at p. 70, indicated that "the right of the accused to the presence, advice and assistance of counsel [is] necessarily included in due process of law. 2 Story Const. 4th ed. § 1949, p. 668."

The government has hitherto argued that petitioner can have suffered no harm from the denial of his right to consult with his attorney since no request for such a

[13] See Mr. Justice Roberts' dissenting opinion in *Snyder v. Massachusetts*, 291 U. S. 97, 130-132 (1934).

conference was made and since in claiming his privilege petitioner did exactly what his attorney, according to the government, had attempted to do for him while he was excluded from the court room. The short answer to this contention is that no request for a conference was made because the court, pursuant to the motion of the prosecutor, had already directed that the petitioner not be informed about what had occurred. Further, as a result again of the prosecutor's motion that petitioner be excluded, his attorney necessarily had to bring to the attention of the court that the line of cross examination proposed by the government was objectionable, and would in all probability force the petitioner to claim his privilege. The anomalous situation is thus presented of the government forcing petitioner to leave the court room and then defending its action by saying the petitioner was not prejudiced since he ultimately and unconsciously adopted the position for which his attorney had argued in his absence.

The government's position must logically mean that any defendant who, without the advice of counsel, fortuitously takes a course of action which an attorney would have suggested to him, cannot be said to be prejudiced within the meaning of the Sixth Amendment by having been denied counsel. Such a result is "shocking to the universal sense of justice": *Betts v. Brady*, 316 U. S. 455, 462 (1942). Furthermore, "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial": *Glasser v. United States*, 315 U. S. 60, 76 (1942).

(4) Impeachment of Petitioner's Credibility

Although the petitioner was indicted for wilfully attempting to evade and defeat his income taxes for the years 1935, 1936 and 1937 and for no other years, the prosecutor was permitted, solely for the purposes of impeaching his credibility, to cross examine him as to whether or not he had in 1938, received money from the numbers game, what he had done with it and whether or not he had used the same "bookkeeping system", as in previous years.[14] These questions were objected to since on their face they related to the commission of other crimes for which petitioner might be indicted at some later date. Nevertheless, he was compelled either to answer them or to claim his privilege. The error thus committed is succinctly demonstrated by the opinion of the dissenting Judge in the Circuit Court (R. 235):

[14] The printed record in this case contains the testimony of many witnesses explaining in detail the inner operation of the numbers business in Atlantic City. This testimony was totally irrelevant and had proper objection been made and exception taken, could very well have been assigned as reversible error: *United States v. Johnson*, 123 F. 2d 111, 125 (CCA 7, 1941), *cert. granted*, 315 U. S. 790 (1942), ordered reargued October 12, 1942. Though the government charged that the source of the payments made to petitioner were monies paid by those engaged in this illicit enterprise for protection, it was neither necessary nor relevant for the government to show anything more than the making of the payments, certainly not all the inside workings of the racket itself. It is very apparent that this evidence was introduced only for the purpose of creating an atmosphere antagonistic to the defendant. From the petitioner's point of view, it now has no bearing on the questions involved on this appeal. It has been printed at the request of the government and the purpose in requiring it to be printed is not at all clear to counsel for petitioner.

"It is less than clear to me how the matter thus inquired about can be deemed capable of serving as the basis for impeachment. Necessarily, even a possibility of refutation would depend upon how the defendant testified in such regard. If he told the truth, he could hardly be thought to have impeached himself, even though a conflict should incidentally develop upon a comparison of his testimony with extraneous matter. Yet, the irrelevant matter, which on the government's theory would constitute a separate offense for which the defendant was not on trial, would have been heard by the jury. On the other hand, if he testified falsely, the government would not be in position to refute him, for the cross examiner is bound by the answers which he elicits to questions concerning collateral matter."[15]

See in accord *Bullard v. United States*, 245 F. 837, 840 (C. C. A. 4, 1917) and *Cohen v. United States*, 56 F. 2d 28, 30 (C. C. A. 1, 1932).

In approving the line of questions relating to collateral offenses of which petitioner had not been convicted, the majority of the Circuit Court is in conflict with its own recent decision in *United States v. Montgomery*, 126 F. 2d 151 (1942), which, peculiarly enough, it cites in the present case (R. 229). The *Montgomery* case also arose in the District Court for the District of New Jersey and there too the question involved was the impeachment of a witness. The Circuit Court held (p. 155):

"It may therefore be taken as the rule that in the trial of criminal cases federal courts are bound by such rules of procedure and evidence as Congress prescribes and such further rules as the federal courts have adopted or from time to time may adopt in the

[15] 125 F. 2d 954, 964 (1942).

light of general authority and sound reason. So treating with the question raised in the instant case, *we believe the rule with respect to impeachment for former conviction, as generally applied by federal courts in criminal cases, to be that it is only convictions for felony or misdemeanors amounting to crimen falsi which are admissible to impeach a witness' credibility.*"

Compare *Melaragno v. United States*, 88 F. 2d 264 (C. C. A. 3, 1937) and cases there cited.

A fortiori the trial court and the Circuit Court were in error in permitting a series of questions relating to criminal offenses for which the petitioner had not even been indicted. Especially is this so since the questions were permitted not to show motive or intent, or a common scheme, but solely for the purpose of attacking petitioner's credibility (R. 139, 173).

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(5) The Perversion of the Privilege against Self-incrimination

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We contend that when the accused in a criminal case is permitted to exercise his constitutional right against self-incrimination, the question of its exercise is a matter solely between him and the trial judge in which the jury has no concern whatever; no inference may be drawn from the claim of privilege and consequently the jury may not be permitted to consider it in determining the credibility of him who invoked it.

In the present case, as has been described, the trial judge permitted the petitioner to be informed that he had a constitutional privilege against self-incrimination, without allowing him to confer with counsel over the effect

of claiming it. Then, after petitioner in this unenlightened state had been granted his privilege, the government attorney argued to the jury that the petitioner should not be believed because he refused to answer and the trial judge charged that the jury could consider the claim of privilege as affecting credibility. In this perverse fashion, petitioner's constitutional right instead of protecting him boomeranged against him in the most unexpected manner. "Of what worth would the protection be if a party availing himself of it incurred detriment or loss by so doing": *Harrison v. Powers*, 76 Ga. 218, 245 (1886).

As was said in the case of *Boyle v. Smithman*, 146 Pa. 255, 275, 23 A. 397, 398 (1892):

> "To extend to a defendant the formal protection of his privilege, and then allow the fact that he has claimed it to be used as affording a presumption against him, would be a sort of mockery of which the law is not guilty."

Likewise, in *State v. Froman*, 45 S. D. 465, 473, 188 N. W. 746, 749 (1922), the court said:

> "We are of the view that the right to claim exemption on the witness stand is as fully protected by the statute, which is merely a legislative interpretation of section 9, art. 6, of the Constitution, as is his failure to testify at all, and that the state is equally precluded from commenting on the fact of such claim being made as it is from commenting on the fact that the accused has failed to testify at all. We think no presumption arises or can be properly urged against the accused in either case without an invasion of his constitutional rights."

The case now before the Court must be distinguished from a case where the defendant takes the stand and after testifying for himself, "stops short" in his testimony and

fails to explain incriminating facts and circumstances already in evidence, relating to the very crime for which he is then being tried: *Caminetti v. United States*, 242 U. S. 470 (1916); *Krotkiewicz v. United States*, 19 F. 2d 421, 424 (C. C. A. 6, 1927). Similarly those cases must be distinguished which turn upon the question of whether the claim of privilege against self-incrimination is proper in the first instance, rather than upon the effect of its grant: *Raffel v. United States*, 271 U. S. 494 (1926); *Tomlinson v. United States*, 93 F. 2d 652 (C. A. D. C. 1937); cf. *Reagan v. United States*, 157 U. S. 301, 304, 305 (1895).

The rule we ask this Court to adopt was stated as long ago as *Phelin v. Kenderdine*, 20 Pa. 354, 363 (1853):

> "When a witness declines answering a question, upon the ground of its tendency to incriminate himself, the objection is addressed to the *Court*, and the decision upon it is to be made by the *Court*, and not by the *jury*. If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it. The exercise of this right by the witness is not under the control of the parties, and no one can be affected by evidence which his adversary fails to produce, and which, therefore, cannot be met or explained by cross examination, rebutting evidence, or otherwise. * * *"

See in accord *State v. Weber*, 272 Mo. 475, 482, 199 S. W. 147, 148, 149 (1917).

If the trial court and the Circuit Court are right in holding that the line of questions was proper, then there

was perhaps "probable error" in permitting the claim of privilege in the first instance since a defendant cannot claim privilege as to a *proper* line of cross examination: *Raffel v. United States*, supra, at p. 497. As the dissenting Judge said, however (R. 238):

> "But having been allowed by the court so to plead in this case, surely the defendant did not thereby subject himself to impeachment merely because he exercised a privilege which the court, even though mistakenly, accorded to him." [16]

It is true that no objection was made or exception taken to this portion of the charge. The Circuit Court considered the point, however, and it needs little citation of authority to show that, in order to prevent injustice, courts will, in criminal cases, correct a fundamental error even though the question was not properly saved: *Wiborg v. United States*, 163 U. S. 632, 658 (1896); *Crawford v. United States*, 212 U. S. 183, 194 (1909); *Burns v. United States*, 274 U. S. 328, 341 (1927); *Ayers v. United States*, 58 F. 2d 607, 609 (C. C. A. 8, 1932); see also *United States v. Atkinson*, 297 U. S. 157, 160 (1936); *Rose v. United States*, 128 F. 2d 622, 626 (C. C. A. 10, 1942).

Conclusion

For the reasons set out above, it is respectfully submitted that this Court should reverse the judgment of the Circuit Court of Appeals for the Third Circuit, set aside the judgment and sentence of the District Court and order a new trial.

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[16] 129 F. 2d 954, 966 (1942).